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Supreme Court of the United States

October Term, 1965

No. 76

HOLMES ELECTRIC PROTECTIVE COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court
For the District of Rhode Island

BRIEF FOR APPELLANT HOLMES ELECTRIC PROTECTIVE COMPANY

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Opinion Below

The opinion of the district court (Wyzanski, J.), including its findings of fact and conclusions of law, are reported at 236 F. Supp. 244 (R 741-69).[1]

1. References preceded by the letter "R" are to pages of the printed record. References to documents in the unprinted record are identified by a description of the document followed by the page number in the original document.

Jurisdiction

This is a civil action under Sections 1, 2 and 4 of the Sherman Act, 15 USC §§1, 2 and 4. The district court entered a final judgment on November 27, 1964 and Holmes Electric Protective Company (hereinafter "Holmes") filed its notice of appeal on January 25, 1965. The plaintiff below and the other defendants, Grinnell Corporation (hereinafter "Grinnell"), American District Telegraph Company (hereinafter "ADT") and Automatic Fire Alarm Company of Delaware (hereinafter "AFA"), each also filed notices of appeal. This Court noted probable jurisdiction on May 17, 1965.

Jurisdiction is conferred by section two of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 USC §29 as amended. *United States* v. *Yellow Cab Company*, 332 U. S. 218 (1947); *United States* v. *du Pont & Co.*, 351 U. S. 377 (1956).

Statutes Involved

Sections 1, 2 and 4 of the Sherman Act and the Fifth Amendment to the United States Constitution are set forth in the Appendix.

The Questions Presented

1. Whether the district court erred in adjudicating that Holmes violated and continues to violate Sections 1 and 2 of the Sherman Act in the absence of evidence of any wrongdoing on the part of Holmes.

2. Whether Holmes can have been held guilty of monopolizing when it is conceded that neither it, nor the defendants collectively, had the power to exclude competition or to fix prices.

3. Whether it is now to be the law, as the district court in this case has for the first time held, that there is a presumption of monopoly power and of monopolization once the relevant market and defendants' combined predominant

share of that market are shown, notwithstanding that there has been no showing or finding that the defendants, individually or together, have either the power to exclude competitors or to fix prices within that market and it has been specifically found that, even collectively, they do not have such power.

4. Whether it is now to be the law, as the district court in this case has for the first time held, that once defendants are found to have a predominant position, it is their burden to prove that their market position did not result from a violation of the antitrust laws.

5. Whether this Court's rulings in *United States* v. *du Pont & Co.*, 351 U. S. 377 (1956) with respect to:

(a) determining the relevant market in an antitrust case under §2 of the Sherman Act; and

(b) the essential elements of a violation of that section are no longer to apply.

6. Whether it is still the law that a specific intent to destroy competition or to build monopoly is essential to guilt of an attempt to monopolize in violation of §2 of the Sherman Act.

7. Whether Holmes' business of providing protection against burglary and holdup on a purely local basis, with no Holmes office serving a subscriber more than 25 miles away or in another state, is part of "commerce among the several states" to which the Sherman Act can be applied.

8. Whether the district court's findings of fact are not clearly erroneous and without basis in the record:

(a) that Holmes is engaged in a national pattern of business (when, in fact, Holmes does business in but one city and its 2 subsidiaries do business in only 2 cities);

(b) that Holmes' business is characterized by a close articulation of control by its parent, Grinnell (when, in fact, Grinnell is in an entirely unrelated

business and has not originated or caused to be overruled a single decision of Holmes' management);

(c) that there is a generic similarity in the contract forms, price lists and instruction forms used by Holmes and its co-defendants ADT and AFA and that the similarity leads to the conclusion that Holmes has violated the Sherman Act (when, in fact, there is no such similarity);

(d) that the accredited central station business is a separate type of business (when, in fact this (1) combines such different businesses as burglary and holdup protection services, which Holmes provides, with fire alarm, sprinkler supervisory and industrial process services, which Holmes does not provide (2) includes Holmes' non-accredited central station business (almost half of its business) in the so-called relevant market and at the same time excludes from that market non-accredited central station competitors of Holmes (3) ignores the fact that industrial process service, which is included in the "accredited" relevant market cannot be "accredited" (4) ignores the obvious interchangeability between accredited and non-accredited service and (5) ignores the cross-elasticity of demand between central station protective services and non-central station protective services;

(e) that the incurring of deficits in some cities by *one* of Holmes' co-defendants (where it, however, concededly does not have central station competition) is conclusive proof of national monopoly power on the part of Holmes or the defendants as a group;

(f) that Holmes' having 19.45% of the subscribers and 12.55% of annual service charges in the designated market was the result of monopolizing or an attempt to monopolize (when, in fact, there is no

evidence of a single predatory act on the part of Holmes and competition is concededly increasing and Holmes' market share concededly decreasing, even in the unrealistically defined market);

(g) that acquisitions, both within and without the designated market, were important sources of Holmes' market power (when, in fact, Holmes has no significant history of acquisitions and has made no acquisition whatever in well over 30 years);

(h) that Grinnell is the principal supplier of Holmes (when, in fact, Holmes purchases *nothing* from Grinnell);

(i) that agreements of April 29, 1907 to which Holmes was not a party (and which were terminated in 1954, long before this suit was brought) had an influence in forming business patterns for Holmes when Holmes was owned from 1905 to 1950 by the New York Telephone Company, a company which was not a party to those agreements, nor a defendant, nor shown to be a conspirator or to have any relation to the charges made);

(j) that an agreement made in 1906 between Holmes and its co-defendant ADT renders Holmes guilty of restraining trade and monopolizing in violation of Sections 1 and 2 of the Sherman Act (when, in fact, the agreement terminated in 1947, fourteen years before this suit was brought and when Holmes was still controlled by the New York Telephone Company);

(k) that ADT or AFA are, as among the defendants, the exclusive source or sources of central station nightwatch and burglar alarm service in Philadelphia and New York (when, in fact, AFA is not engaged in any such business; Holmes is engaged in such business and concededly has increasing competition in those cities from non-defendant companies).

9. Whether the foregoing errors in its findings of fact with respect to Holmes does not demonstrate and confirm that Holmes was not accorded a fair trial and that the judgment is erroneous.

10. Whether the district court additionally erred in:

(a) failing to disqualify itself in spite of having acknowledged that it had formed a conclusion on the merits prior to the reception of evidence;

(b) requiring that the action be tried on only 18 days' notice, without prior warning to the parties and without adequate pre-trial procedures to set forth and narrow the issues, in view of the obvious complexity of the issues, the volume of the documents designated by the plaintiff as exhibits and other circumstances making such interval altogether inadequate for final trial preparation;

(c) accepting in evidence against Holmes every item of evidence tendered by plaintiff, including hearsay evidence not binding on Holmes and statements of alleged co-conspirators without there being evidence of the alleged conspiracy or Holmes' connection to it;

(d) making Holmes vicariously liable for every act of the other defendants without there being any basis therefor;

(e) imposing on Holmes, by post-trial ruling, a burden of proof vaguely defined and never theretofore imposed upon a defendant under the statutes here involved and finding that Holmes had not discharged such burden;

(f) failing to give due consideration to the evidence and arguments presented and basing its decision upon speculation rather than solely upon matters in evidence and the applicable law.

11. Whether the district court further erred in:

(a) including Holmes in its injunction, directed broadly to all defendants, enjoining them from any future acquisition of stock, assets or business of enterprises in the designated market in the absence of any significant history of prior acquisitions by Holmes or evidence of market power by Holmes and especially in view of the requirement of the decree that Grinnell divest itself of the stock of Holmes and the other defendants;

(b) enjoining the defendants, including Holmes, in broad, unclear and imprecise terms from restraining trade or monopolizing or attempting or conspiring to restrain trade or monopolize in the designated market or issuing further injunctions affecting Holmes, and particularly in view of the express and undisputed findings that the defendants, even collectively, had not the power to exclude competition or control prices;

(c) requiring Holmes (again broadly as one of the defendants) to file with the Antitrust Division of the Department of Justice its lists of standard prices and terms of sale and servicing and a record of every quotation, written or oral, departing from those lists or terms, within two weeks of the quotation when Holmes sells a service, not a commodity, concededly has competition in each of the communities in which it does business and its competitors are not so burdened, the plaintiff did not request such relief and the district court expressly found that the defendants' share of the designated market and of the revenues therefrom have declined since 1957.

12. Whether the district court did not seriously abuse its discretion and whether its conduct of the trial and its decision has not:

(a) deprived Holmes of a fair trial on the basis of matters properly admitted in evidence by an impartial trier of the facts who has not formed an opinion on the merits before the trial;

(b) deprived Holmes of its right under the Fifth Amendment to the United States Constitution not to be deprived of liberty or property without due process of law or to suffer its property to be taken without just compensation;

(c) departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Court.

13. Whether a new trial before another judge is required or whether the complaint should be dismissed.

Statement of the Case

The relevant facts in this case are amply stated in the briefs of co-defendants Grinnell and ADT. Reference is, accordingly, made to those briefs for their statements of facts, as if the same had been reproduced herein.

Summary of the Argument

Conscious of the deference we owe to the district court below and yet aware also of our obligation to justice and our client, we must say that in this case a senior United States District Judge, after indicating prejudgment of the case before the trial, resulting in the making and denial of a motion to disqualify on the grounds of bias and prejudice, explicitly acknowledged at the outset of the trial that he had in fact formed an opinion on the merits.[2]

2. This is what the district court said to defendants' counsel at the beginning of the trial (R 336): "You yourself put on me the burden of forming an opinion *and I did form one.*" (Emphasis added.) The district court's claim that defendants' counsel forced him to form an opinion before the trial is obviously irrelevant and, beyond that, as shown in the Grinnell brief herein, is incorrect.

So, too, we must report that this prejudgment of the case was followed by a vindictiveness and lack of attention to fairness and the record evidence that deprived the defendants—and particularly the defendant Holmes which finds itself in a geographic market in which it did not do business, in a product market which excludes competitors doing the same business as it is doing, and charged with activity in which it had not engaged—of a fair trial and a just decree.

More specifically, the district court, over defendants' urgent and repeated objections, set the case down for trial on 18 days' notice; denied defendants' motions to allow more time (two months) before the opening of the trial and to narrow the issues; urged, indeed, insisted that the government offer, in bulk, the entire mass of its documentary proof, covering hundreds of exhibits and tens of thousands of pages; admitted these papers in evidence, en masse; and overruled defendants' objections with a statement to the effect that it would not consider those items which were improper (R 252-69, 272-84, 326-30, 339-40, 345).

As a result, in the one hour it took the district court to force the government's entire case to completion, there was accepted in evidence against Holmes every item of evidence tendered by plaintiff, including hearsay evidence not binding on it and statements of alleged co-conspirators, without there being any evidence of the alleged conspiracy, and Holmes was made vicariously liable for every act of the other defendants. This departure from the accepted and usual safeguards afforded defendants in a proper judicial procedure denied Holmes a fair trial on the basis of matters properly admitted in evidence by an impartial trier of the facts. That this is so is amply confirmed by the numerous findings of fact as to "defendants" which are totally erroneous in the case of Holmes and which attribute to each of the defendants the business activity and volume of all of them. Apart from its other vices, this improperly makes the Sherman Act applicable to the wholly intrastate activities of Holmes since Holmes does not have a single subscriber that is not served by a central office within 25 miles

and in the same state. (R 34, 671-2, 676, 713, 2305, 2307, 2309-12, 4053, 4209, 4312-3; Finding 3, R 747; Finding 8, R 748.)

More than that, convinced that this Court (the Supreme Court) was looking for a new and radical leap forward in antitrust jurisprudence—as the district court put it (R 371): "we are faced with an attitude of predicting how far out nine movable men moving to the left will move"—the district court announced, concededly for the first time and after the trial, that it was taking a new approach to §2 Sherman Act charges and placing a new and theretofore unstated burden on the defendants in this case. Because, in the market as defined by the district court, the defendants collectively had a predominant position, the district court held that it was their burden to establish that they did not have monopoly power and, since the defendants did not carry that burden (which burden they did not know was theirs until after the decision), they were, collectively, guilty of monopolizing. (Opinion, R 746.) And this was so notwithstanding, as was expressly found, that they neither individually nor together had either the power to exclude competitors or to fix prices and notwithstanding that their market share since 1957 had concededly been diminishing and their competitors' prospering. (Findings 45, 46, R 756.)

The ostensible reason for this acknowledged departure from the rules hitherto applicable to a suit under §2 of the Sherman Act was, that "most of the cognoscenti have expected that a day would come when the Supreme Court would announce" such a departure and "To this [District] Court it appears that the day has come" so that "The Government * * * ought not to be allowed to consume time in needlessly proving defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role." (Opinion, R 745-6.)

The district court did not mention that the time saved would only be its own time in this case since, if the district court's theory is adopted, in future cases, where defendants

are apprised that such theory is in operation, the time saved in plaintiff's case will be more than offset by the time consumed in defendant's effort to prove a negative, that is, that its practices and policies were proper and that it did not violate the antitrust laws.

For whatever reason, however—be it bias, haste, or unconcern for this particular case in its effort to author a revolutionary rule—the district court just did not digest the record evidence. If it did, it could not have been so unspecific in its findings of facts, nor in such obvious error in so many of its findings. Nor could it have found a market so commercially unreal.

Indeed, it expressly appears that the district court did not even *attempt* to digest the evidence. As seen, it admitted everything that the government offered, en masse, without examining any of it, and overruled defendants' objections with the statement that it would only consider such objections as might be "likely to influence me" (R 345). Recognizing that this approach "had some disadvantages for the defendants", the district court stated that it would "key to particular documents or other exhibits or pages of the transcripts such support as there may be for such findings, conclusions, or judgment as I enter." (R 340). This, it did not do. Not a single finding is keyed to any document, exhibit or transcript page. Nor are the findings, which are largely conclusory, in compliance with the requirements of Rule 52(a). The district court revealed what it no doubt did when, in its opinion, it said "Few judges who have sat in such cases have attempted to digest the plethora of evidence, or indeed could do so and at the same time do justice to other litigation in their courts." (Opinion, R 744.)

Thus, to summarize, at the outset of the trial the district court declared that it had formed an opinion on the merits and, at the conclusion of the case, it acknowledged that it had made no attempt to digest the evidence. And, in between, it assumed a conspiracy that was not; made findings that are directly contrary to the evidence and the facts; attributed to each of the defendants all of the business and each of the acts of any of them; erroneously held the

Sherman Act applicable to the wholly intrastate activities of Holmes; announced and imposed a wide, unwarranted and extremely unwise departure from normal and well-considered antitrust jurisprudence for the sole purpose of saving the trial court's time (when, in fact, if adopted by this Court and therefore known to future defendants, those measures will have served to save the time of the trial judge in this case only and will lengthen the record beyond what it would otherwise be in all subsequent cases); designated a relevant market that has no relation to commercial reality; and decreed unprecedented and wholly unwarranted relief.

We say that if ever there was an antitrust case that called for reversal and dismissal, this is it. We ask for nothing more than elementary fairness. We ask this Court to deny the power of a district judge to arrogate conclusions that stem from ego or other external sources, rather than evidence properly received. We ask further that this Court determine that the so-called "accredited central station protective service market", as found by the district court, is a commercially inapt market, that there is no evidence to support the charge of an attempt to monopolize or a conspiracy in restraint of trade, and that the complaint, accordingly, be dismissed.

ARGUMENT

POINT I

There is no evidence that Holmes violated the antitrust laws even in the unreal market designated by the district court.

Holmes is a small, but old and respected firm. It is not a monopolist and, obviously, could not monopolize. Nor is it guilty of any restraint of trade or any attempt to monopolize. Even in the market employed by the district court, Holmes has only some 12% of the revenue and this share has unquestionably been decreasing.

Holmes provides burglary and holdup protection service through local central stations maintained by it in New York City (Finding 8, R 748; R 2301, 2309). Separate subsidiary companies (which are not defendants) maintain local central stations to provide similar service in Philadelphia and Pittsburgh (R 31, 676, 2305, 4053, 4209-10).

Holmes' total net worth, including its subsidiaries and its good will, as evidenced by a sale of all of Holmes' stock eleven years before this suit was brought, was only $4,256,000 (R 675, 4121).

It is undisputed that Holmes has accredited central station protective service competition in each of the three cities in which either it or a subsidiary does business (Finding 8, R 748; Stipulation 6, R 315-6; R 4507-8). It is also undisputed that such competition is intense and increasing (see, e.g., Stipulation 5, R 2266-78; Stipulation 6, R 313-6; R 212-7, 708, 723-4, 2216-27, 2640-1, 2645-6, 2657, 2732-4, 2842, 2844, 2849, 2852-3, 4477-9, 4507-8, 4629, 4631, 4684, 4952-3). So, too, it is undisputed that Holmes' competitors are growing and prospering (Findings 45, 48, R 756; Stipulations 5 and 6, R 2266-78, 313-6; R 2682-3, 2689, 2728-9, 4605-13, 4669-70, 4955-6). Likewise, it is undisputed that Holmes' market share, even in the absurdly narrow "accredited central station protective service market" is diminishing and has diminished steadily since 1957 (Finding 45, R 756; Stipulation 6, R 2266-78; R 204, 213, 708). Beyond that, as will be seen, there is a functional identity and perfect cross-elasticity of demand, not only between accredited and non-accredited central station burglary protection service, but also between central station burglary protection service and non-central station burglary protection service—customers switching from one to the other, and, customers using either one or the other to protect premises that are similarly situated.

Holmes was a pioneer in the field of providing burglary and holdup protection service. Edwin Holmes, sponsor of an electric burglar alarm, founded Holmes in 1858 and, together with his son, Edwin T. Holmes, originator of the first telephone exchange, incorporated it in 1883 (R 206,

2301). In 1905, Holmes became a subsidiary of the New York Telephone Company and remained as such until the telephone company sold 100% of Holmes' stock to Grinnell on April 14, 1950 for $4,256,000 (R 206, 675, 4121).

Holmes operates its business along the lines established by its parent of 45 years, The New York Telephone Company, and Edwin Holmes, its founder, who was associated with the telephone business from its beginnings (R 206, 649). It makes two charges for the central station service it renders: (1) it installs its alarm equipment and wires on the premises of its subscribers (like the telephone company installs its communication equipment and wires on its subscribers' premises) and it makes an installation charge therefor (as the telephone company does for the equipment it installs), retaining title to such equipment (as does the telephone company) which represents a substantial asset on its balance sheet (as is the case with the telephone company) and (2) it provides protection services to its subscribers for which it makes a monthly service charge (as does the telephone company for the communication service it provides) (R 206, 646-8, 1352, 2229-34, 2306-13).

Grinnell is a manufacturer of piping, plumbing and heating products, which it sells primarily to the construction industry, a very cyclical business (R 163-4, 670).

Grinnell did not solicit the purchase of Holmes nor its other co-defendants and it made each purchase to obtain a stable depression-resistant source of income to balance the highly cyclical nature of its own manufacturing business (R 163-4, 674, 676, 4053, 5106).

Grinnell is not engaged in rendering any protection service, through central stations or otherwise (R 164, 718; Finding 17, R 750). Nor, contrary to the findings of the district court, does Grinnell supply anything to Holmes or does Holmes buy anything from Grinnell (R 163-4, 675, 677, 2341-3, 4313).

A. The district court's findings of fact are conclusory, unsupported by the record and erroneous in substantial degree.

Some of the vice of what has happened here is revealed by the blatant errors in the district court's findings of fact. Thus, in Finding 17 the district court declares "Grinnell * * * manufactures the alarms, sprinklers, and other equipment which may be denominated the machinery of the business. It is the principal supplier of the dominant companies in the market" (R 750). If that is so, then the district court has recognized that Holmes is not "a dominant company in the market" because Grinnell supplies *nothing* to Holmes.

Along the same lines, in Finding 15, the district court incorrectly states:

> "In 1960 the alarm company defendants together with all other CSPS [central station protective service] companies obtained from United States manufacturers in various states over $12,000,000 worth of protection equipment for installation. According to page 6 of the Reply Brief for defendants, ADT, Holmes and AFA, all this equipment was 'manufactured * * * by the defendants' (presumably overwhelmingly by Grinnell)."

This presumption is unquestionably erroneous because, for one thing, Grinnell is not a supplier to Holmes. More than that, as the reply brief quoted from specifically stated, the $12 million dollar figure was the value of equipment purchased, installed and manufactured "*by defendants*" and contrary to what the district court said—and this is made unmistakably plain on the very page of the reply brief quoted from by the district court—it did *not* include the value of equipment purchased, installed and manufactured *by competitors* of the defendants. The district court, in this instance, not only lumped Holmes into a group with which it did not belong, but also added an error in fact and followed that with an incorrect presumption—a presump-

tion that obviously and improperly goes a long way toward its conclusion that Grinnell has been guilty of wrongdoing.

The keystone to the whole arch of erroneous findings, topped off by the extraordinary decree in this case, is the district court's misapprehension of the control which Grinnell, through Mr. Fleming, exercises over its co-defendants. This misapprehension clearly and strikingly appears in the findings of fact. The district court specifically found that in only one instance did the board of directors of any of the alarm companies ever veto or override a decision of Mr. Fleming (Finding 23, R 752). Actually, the testimony and the facts are completely and unmistakably to the contrary: in only one instance (and that involved European operations of ADT—not here at all relevant) did Mr. Fleming or Grinnell disapprove of any actions proposed by any of the alarm companies (R 693-4).

More specifically, Mr. Fleming was asked (R 693):

> "Q. I would like to ask you one further question in connection with this. Since you and the other Grinnell men have been sitting on the Boards of Directors of these companies, do you recall any instance where the Board of Directors has vetoed or rescinded or overridden any management proposal or plan?"

Mr. Fleming's answer was exactly to the contrary of the finding. He answered (R 694):

> "A. We had one instance in ADT. It was a question of whether ADT was to go ahead with a central station in Paris, France. Mr. O'Brien [ADT's President] and Mr. McDonald [another officer-director of ADT] voted against it. Mr. Gaston [a former President of ADT] and the rest of the directors voted for it. And we are going ahead with it as rapidly as possible. But *that is the only instance that I know of.*" (Emphasis added.)

This utter misapprehension of Mr. Fleming's and Grinnell's role is a mirror of the approach of the district court to the record evidence in this case. This erroneous belief

that Grinnell made the decisions for each of its co-defendants produced, throughout the findings, similar errors—which grow apace as the findings become more and more generalized and conclusory. Again and again the findings speak of "the defendants" or "the affiliated companies" with respect to activities that are totally incorrect insofar as Holmes is concerned.

Thus, Finding 16 (R 750) states "the alarm company defendants" provided service to thousands of subscribers "of whom more than 900 were each located in a state other than the one wherein the servicing station was located."

This is not true. No subscriber of Holmes or AFA is in a different state than the station which serves it (Findings 3, 8, 9; R 747, 748-9; R 34, 634, 671-2, 676, 713, 2307, 2309-12, 2328, 4053, 4209, 4312-3).

Again, Finding 16 states that the charges of "the alarm company defendants" in 1960 "included $677,598.15 for interstate transmission of signals over wires", and Finding 39 (R 755) divines "a national market" from the supposed "close articulation of control from the pinnacle of Mr. Fleming down the whole range of subordinate officers" and "an appreciable extent [of] electric current carrying alarm signals from one state to another."

This, too, is not and could not be so with respect to either Holmes or AFA since, as seen, neither of those companies have a single out-of-state subscriber.[3]

In like vein, and with characteristic imprecision, Finding 48 makes another sweeping statement as to the "defendants" that has no application to Holmes. It declares "the evidence rather plainly indicates that acquisitions, both within and outside the relevant market, were important sources of the market power achieved by the alarm company defendants." (R 757.)

This, too, is incorrect as to Holmes which has had no substantial history of acquisitions and, in point of fact,

3. As will be seen later (Point IV), it is only by this wrongful attributing of the business of its co-defendants to Holmes that Holmes can be brought into this suit at all because Holmes is not engaged in interstate commerce and the charges made with respect to Holmes only affect intrastate activities.

has made no acquisition of any kind in well over 30 years (R 165, 248).

Once more, after mentioning a number of acquisitions (only 2 of which, however, were in the designated market) by ADT, but not a single acquisition by either Holmes or AFA, the district court adds this broad-brush finding (No. 51, R 758): "It is unnecessary to pause for elaborate description of the other acquisitions of ADT or Holmes or AFA, if any, or of the occasional accompanying covenants by sellers not to compete with the alarm company defendants. Enough has been noted to see why it is that defendants have not borne, and cannot bear, their burden of showing that their proportion of the market is a mere tribute to their perfect performance."

Apart from the fact that it is plaintiff's burden to establish the charges made and not defendant's burden to show that "their [collective] proportion of the market is a mere tribute to their perfect performance" and apart from its conclusory nature, this finding has the further infirmity of being incorrect insofar as it suggests that Holmes has made any illegal acquisition.[4]

Likewise, in Finding 55 (R 760) the district court's statements have no application to Holmes, merge the pricing activities of all of the defendants, state them as if each defendant had the same prices and policies, and are incorrect. That finding recites:

> "Although defendants have a 'Schedule of Minimum Basic Service Charges' and 'ceiling prices' which constituted their standard rates, they depart therefrom when they encounter actual or threatened effective

4. The conclusory findings are as numerous as the erroneous ones. Finding 42 is illustrative. In full, that finding tells us (R 755): "When all the rest can see a typical American national business enterprise flourishing in an interstate market, federal courts too get the signal and can hear the alarm sounded when such a market is subject to restraint of trade or monopolization." And that "finding" apparently was deemed by the district court to be "detailed" because it is followed by Finding 43 which begins "From the foregoing detailed facts there emerge as ultimate facts, found by this Court. * * *" (R 755).

competition. Departures have included (a) frequent quotation of prices with an annual service charge less than 100% but not less than 80% of the minimum basic rate, and with an advance service charge less than 100% but not less than 60% of the minimum basic charge, (b) occasional installation of CSPS without charge, (c) rarely, successive bids each, progressively, lower than the so-called standard minimum basic rates, (d) at least once, the reduction of rates at all locations of a chain-business account to preclude a competitor of defendants from securing in one city an account of that chain, and (e) infrequently, the deferment of prompt payment of installation charges. Sometimes these departures have merely met the prices of competitors; but, on other occasions, rare though they were, the departures undercut or beat competitors' prices."

The defendants did not have the same prices; they did not have the same ceiling prices nor did each have ceiling prices; and they did not have the same pricing practices.[5] Holmes, for instance, had no "ceiling prices"; no "advance service charge"; no "minimum basic service charge"; no "standard minimum basic rate"; no national "chain-business accounts"; no quotation of prices in accordance with the formulae, or any different percentages mentioned by the district court; and there is no evidence of any other pricing acts or policies on the part of Holmes that can be denominated wrongful (R 165, 217, 2308-11, 1612-3, 1352, 2067). Actually, the language used in the finding is enough to measure its transparency and its lack of weight. In this one finding, the words "occasional", "rarely", "at least once", "infrequently", "sometimes" and "on other occasions, rare though they were" all appear. Such phrases, we submit, denote more an effort to support a tenuous conclusion already made, than to reach a sound one.

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5. Indeed, Holmes and its two subsidiaries each had different annual service charges and their installation charges were developed from published salesman's Estimating Guides, different than what ADT or AFA did (R 2309-11, 235-6, 2323, 2329, 2291, 4618).

Equally rare—and equally wrong—we further submit, is the decision that was based on findings such as that.

Unfortunately, however, there are more such findings. Thus, Finding 25 (R 752) asserts that "there is a generic similarity, though not an identity in the contract forms, price lists and instruction forms used by the three alarm company defendants." This is not so. Holmes is not even in the same business as AFA (Holmes provides burglary and holdup protection while AFA provides fire alarm, sprinkler supervisory and valve alarm protection service [R 634, 676, 4053, 4209-10, 4312-13]). Those two businesses obviously involve services that are not interchangeable, face different problems and use different devices and methods to meet them. Holmes has a usual initial contract period of three years and many of its contracts are for one year; ADT and AFA have almost all five-year contracts (R 248, 2047-54, 2199, 2200, 2201, 2232, 2234, 2289-90, 2306-7, 2322, 3669, 3673, 3677, 3679, 3681, 3683). Holmes, unlike ADT, makes no advance service charge (R 235, 555, 1631, 3811, 2311). Holmes' installation charge, differing from ADT's advance service charge, is calculated on the specific types and numbers of windows, doors, etc., on the premises to be protected (R 235-6, 555-7, 2308-11, 2290-1, 2685). Holmes has automatic contract renewals; ADT re-negotiates or goes on a month-to-month basis; while AFA re-negotiates or goes on a year-to-year basis (R 2229-34, 2047-54, 2199-2202, 2325, 3669-83). Holmes, unlike ADT, has no national accounts salesmen or departments (R 245-6, 417-20, 425-7, 615-6, 676). Holmes, unlike ADT, has no government sales department (R 485, 2309-11). ADT salesmen operate on a base salary plus commission (R 4360, 1621, 1971); Holmes salesmen operate on a straight salary and bonus basis. Holmes has monthly service rates based primarily on the number of systems or lines; ADT has a charge system based on an annual charge per unit installed (R 555-6, 1612-3, 2007, 4626). Holmes does not use ADT forms or price lists (R 470, 443-4, 438, 2291, 2067, 2309-11). In point of fact, the disparity of their operations and records is surprising. But, even if there were, in the words of the district court "a generic similarity,

though not an identity" in the forms used by the defendants, it hardly follows that any wrongdoing is involved. It is a common-place for business forms to have a generic similarity—even an identity—and very often when the businesses have nothing in common. Accountants, lawyers, business-form producers and experience itself all press upon a legitimate businessman forms having "a generic similarity though not an identity" with forms used by other firms. To suggest that the use of such forms points to wrongdoing is to demonstrate how far the district court was compelled to strain in an effort to support its unsupportable determination.

Finding 47 (R 756) is yet another example of the district court's amazing facility to find that which is plainly normal to be egregious in the case of these defendants. The district court there found "one or more of defendant alarm companies choose in some areas to operate at a loss".

Neither Holmes nor AFA operate at a loss in any city (R 676, 709). Nor do either of them operate nationally (Findings 8, 9; R 748-9; R 634, 672, 676, 2309-12, 2323-4, 4053, 4209). ADT, which originated at the beginning of this century as a subsidiary of Western Union Company—and which remained a subsidiary of Western Union until 1953—furnishing, to subscribers in the vicinity, alarm services out of the various Western Union offices around the country, no doubt wound up with some locations which were unprofitable (R 205-6, 414-5, 550, 3099, 4191-2). Some of its stations still operate out of Western Union offices (R 550). The district court notes (Finding 47, R 756-7) that these unprofitable ADT locations were *all* in cities that could not support another central station, yet it states that this "conclusively proves that defendants enjoy national monopolistic power which permits one of the conspirators to occupy local markets where no independent CSPS station would long function and to extend to each of them the combination's national monopolistic control."

No conclusion, we submit, could be less correct when it is understood, as the district court understood (because it mentioned it) that ADT "operated [these] 20 deficit offices

in cities with no other central station" and "where no independent CSPS station would long function" (R 756-7).[6] This was, in other words, not a situation where monopoly power in one area sustained a level of earnings that permitted the cutting of prices to loss levels in other areas to keep or drive competition out, but an acknowledged case where the "monopoly" locations operated at a loss. Far from being, as the district court found it, "conclusive proof" of monopoly power, this is nothing more than a case in which the business in the areas where losses were sustained was insufficient to make profits. This must occur in countless businesses. These undoubtedly were cities where business had not reached a level where a central station could profitably be operated. How could monopoly "conclusively" be demonstrated by being in a business in a community before it—or business volume—has built up to support profits? Put another way, there was no showing that prices were manipulated in monopoly fashion in these areas, nor could there be, for sustaining losses in the absence of competition is not proof of market power, but the reverse of what occurs when there is monopoly power. In point of fact, apart from the district court's presumption of monopoly power (based on defendants' predominant share of the supposed market and their failure to prove that they did not monopolize), there was no monopoly power, that is, there was—and this the district court expressly conceded—no power to exclude competition or to fix prices. And, having losses where there was no competition does not "conclusively" demonstrate or even suggest anything to the contrary.

To go on, however, Finding 21a erroneously recites (R 751):

> "Since 1919 the balance sheets of Grinnell, submitted as part of Grinnell's reports to its stockholders,

6. This, of course, in itself proves that there must be effective competition from other than central station protection service and, it necessarily follows, a market isolating central station protection service is not a real market.

have shown, though in unconsolidated form, the results of the operations of all 4 defendants."

In 1919, however, Holmes was controlled by the New York Telephone Company; ADT was owned by Western Union and AFA had not been incorporated (R 205-6, 2318). Grinnell did not acquire its interest in AFA until 1949, in Holmes until 1950 and in ADT until 1953—the latter, incidentally, only after approval by the Department of Justice (R 673-81).

Grinnell's owning a majority of the stock of its three co-defendants thus could not have been deemed so bad or the Department of Justice would have disapproved the latter acquisition in 1953. And Grinnell has not done anything improper since that time. Grinnell has not interfered with or affected Holmes' operations in any way. Grinnell has in no manner attempted to integrate Holmes into its organization. Grinnell does not consolidate Holmes' income on its financial statements. Grinnell did not change Holmes' management after it acquired its stock. And Holmes' experience in these matters is typical of that of ADT and AFA. (R 163-4, 669, 677, 690, 692-4, 718, 2348, 4216-7, 4313, 4314; Findings 21, 21a, R 751.)

More than that, Grinnell has not provided Holmes with its purchases (R 163, 677, 2341-3). Holmes' president acts as chairman of its board of directors and, while Grinnell officers have sat on Holmes' board, there is no evidence that they have originated or caused to be overruled a single decision of Holmes' management—in fact, the evidence, contrary to the district court finding (No. 23, R 752), is explicit that they did not (R 694).

In short, there is no evidence that Grinnell exercised such control over the activities of Holmes and its co-defendants that Holmes became part of a multi-state combination or conspiracy in restraint of trade. The evidence is to the contrary and neither the findings nor the opinions of the district court even attempt to analyze the evidence in this respect.

It necessarily follows that the imputation of the acts of each defendant to all of them is improper. Yet this is the very foundation upon which the district court's conclusions of wrongdoing are based. Agreements of April 29, 1907 (which expired in 1954) between Grinnell, ADT and others—but not Holmes—and an agreement of September 28, 1906, between ADT and Holmes (which terminated in 1947, three years before Grinnell had anything to do with Holmes [R 674, 1362, 1364, 4561-2]), become in Conclusions of Law 1-5 violations of §1 of the Sherman Act and "a chief avenue by which the alarm company defendants previously attempted to monopolize, and now do conspire to monopolize, and do monopolize, the national market in the accredited CSPS industry" (R 760-1). There is no evidence that Holmes even knew of the 1907 agreements or that Grinnell had ever heard of the 1906 agreement (R 166). And each of these agreements concededly expired years before this law suit and concededly also "are no longer legally effective" (Findings 51a-53, R 758; Conclusions of Law 2, R 760).[7]

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7. Illustrative of the unsound and superficial basis for these findings, Finding 53 (R 759-60) includes a particularly blatant misstatement of fact. In noting the 1907 agreements, that finding goes on to state:

> "Much of the pattern established under the 1907 agreements continued, without legal buttress, at least until this suit was brought, —for, as among defendants, ADT continues as the exclusive source of central station nightwatch and burglar alarm service, AFA as the exclusive source of central station nightwatch and burglar alarm service, AFA as the exclusive source of central station fire alarm service in New York, Philadelphia, and Boston. * * *"

Nothing could be further from the truth. AFA is not engaged in furnishing burglar alarm service and, if it was, neither it nor ADT would be the exclusive source for that service in these cities because Holmes and many others furnish burglar alarm service in New York and a subsidiary of Holmes and many others do likewise in Philadelphia. Nor is AFA the exclusive source of central station fire alarm service in New York, Philadelphia and Boston. (Stipulation 6, R 313-16; R 634, 676, 2309, 2311, 2713, 4053, 4209-10, 4312-13; Findings 8, 9; R 748-9.)

Recognizing that it "might be too late for the Government now to seek against defendants relief from the legal instruments as such" and that "Proceedings under Section 1 may come too late: for example, the formal restraints may have been withdrawn, or laches may have intervened, or * * * hoary precedents sustaining as valid what the current law now regards as undoubted restraints of trade may preclude the Government from securing an injunction against the restraints as such" (Conclusions of Law 3, R 761; Opinion on Liability, para. 11, R 764), the district court all but expressly acknowledges that its Sherman Act §1 conclusions are unsound—even apart from there being no basis to impute the acts of each defendant to all of them.

Declaring (Conclusions of Law 3, R 761) that "the folds in the industrial scene have remained even though the technical pressure of the legal instruments has been withdrawn" and that "Channels of activity begun under legal formalities became habitual, and, even after the formalities had expired, in most cities have continued to carry the same menace to free trade" the district court winds up its "Opinion on Liability" with these significant words (R 764):

> "Yet though the Government may be barred from getting under Section 1 relief directly against the restraints, it may, nonetheless, under Section 2 get relief against the consequences of the restraints *if, but, of course, only if,* they have gone so far as to involve a continuing monopolization." (Emphasis added.)

Thus, on the facts, there is unmistakable acknowledgment by the district court itself that, absent monopolization, there is no Section 1 case here. And since there is no proof of monopolization (that is, of the power to exclude competitors or fix prices) (Findings 45-46, R 756), nor of any predatory acts on the part of Holmes (R 165, 705, 710, 713-4, 4693, 4954, 4977), there is no sound basis for either a §1 or §2 violation.

To sum up, the only credible connection that Holmes has with this case is that Grinnell acquired 100% of

Holmes' stock from the New York Telephone Company (which is not a defendant or a co-conspirator or guilty of any wrongdoing) in April 1950 for $4,256,000 and that Holmes, in 1906, when controlled by the New York Telephone Company, entered into an allegedly illegal agreement with ADT, which agreement indisputably terminated in 1947, almost a decade and a half before this suit was started and while Holmes was still controlled by the telephone company.

Neither of those events is basis for finding that Holmes is violating any antitrust laws and the lack of specificity and accuracy in the district court's findings reinforce the conclusion that this is so and that its determination that Holmes has violated the law is wrong. As this Court said in *U. S.* v. *United States Gypsum Co.*, 333 U. S. 364 (1948), at p. 395:

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' * * * A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The short of it is that the court's conclusions cannot stand alone; when a judge is wrong in so many basic operative facts, his conclusions necessarily fall also.

POINT II

The market designated by the district court is commercially unreal and plainly inappropriate to determine whether monopolization exists or was attempted.

Apart from the prejudgment of the case by the district judge and apart from the basic misstatement of the facts underlying his conclusions, there is another fatal defect here. The market designated as relevant to support the conclusion that §2 of the Sherman Act has been violated (a so-called "accredited central station protection service" market) is patently unreal.

The definition of the market by the district court is treated at length in the brief of ADT herein and will not be detailed again.

It should be noted, however, that Holmes has intense and increasing competition, from accredited and non-accredited central stations and from a variety of non-central station protection services, in each of the three cities in which it or a subsidiary does business (see, e.g., R 2216-27, 4507-8, 313-16, 614-15, 638-9, 748, 212-17, 2266-78, 4209-10, 4341-3, 2889-90, 4477-9, 4617-18, 4652-3, 4971-2).

A central station is one which is connected by wire to alarm devices on a subscriber's premises and is manned around the clock by men ready to respond to alarm signals (R 4312). Protection companies that are willing to accept the administrative burden and expense of submitting to the testing and reporting requirements of an insurance rating organization are accredited by that organization to issue underwriters certificates in its name to subscribers who then are eligible for insurance premium discounts (R 4670-1, 4914-15, 3207-8, 789-803, 843-76).

Apart from other accredited central stations (which are in operation in each city in which Holmes or its subsidiaries do business) and non-accredited central stations (which

also operate in each city in which Holmes or its subsidiaries operate) defendants face direct competition from:

(1) proprietary systems (central stations manned by the subscriber);

(2) direct-connected systems (alarm devices on protected premises connected directly to police stations or fire houses);

(3) auxiliary systems (alarm devices connected to the municipal fire system, but not directly to the fire house);

(4) local alarm systems (alarm devices which sound a loud warning bell or buzzer in or outside the protected premises);

(5) telephone answering systems (alarm devices connected to a telephone answering service whose personnel call the appropriate authority); and

(6) watchman service.

Except for auxiliary systems (which relate to the fire protection business—in which Holmes is not engaged), Holmes competes with each of these systems, loses customers to them and gains customers from them (see, e.g., R 2640-1, 2646, 2849, 2852-3, 2878-9, 4615-16, 4617-18, 4619-22, 4612, 4627-31, 4633, 4649-84).

To exclude these real competitors from the relevant market is to ignore reality, as will be seen shortly.

Even more, the so-called "accredited central station protective service" market designated by the district court:

(1) is said to be national (while neither Holmes nor AFA, including their subsidiaries, operate in more than three cities);

(2) includes the non-certificated business of accredited central station operators (and 72% of central station burglary and holdup alarms serviced by accredited non-defendant companies are not certif-

icated; 61% of such alarms serviced by ADT are non-certificated; and about half of Holmes' subscribers are non-certificated (R 311)) so that the supposed "accredited" figures include a significant volume of non-accredited business;

(3) includes industrial process services which are non-accredited and not eligible for accreditation.

(4) *includes* the non-certificated business of the defendants while it at the same time *excludes* the same non-certificated business of their non-accredited competitors; and

(5) combines (a) burglary and holdup service with each other and with (b) fire alarm, sprinkler supervisory and waterflow services and (c) industrial process services (notwithstanding that these are all different businesses and that Holmes, from its founding in the 19th century, has only engaged in furnishing burglary and holdup service and that AFA, from its inception, has only furnished fire alarm, sprinkler supervisory and valve alarm protection).

These facts alone amply illustrate the unreality of the designated market. If insurance accreditation or certification means anything, the inclusions and exclusions above make no sense. Actually, there is an even larger defect in the designated market since accreditation is not a significant commercial factor. Many protection companies which are not accredited could readily become accredited, but see no commercial advantage in doing so and choose not to seek accreditation (see, e.g., R 3009-11, 4793, 4800, 4804-5, 4914-15, 5132-4, 5179, 5342, 5488, 5497, 5501-2, 5638, 5666, 5750, 5756; GX 337, pp. 26-7, 35, 42-6; Exh. W-42, p. 13; GX 356, p. 31). Yet, in the business world, they compete just as much for the particular protection service they render. The fact that so much of the accredited central station operators' subscribers choose not to be certificated (almost 50% in the case of Holmes and 61% in the case of ADT) con-

firms, apart from anything else, that accreditation is not a significant commercial factor and, more than that, that it was substantial error to include the non-certificated business of accredited companies and to exclude identical business of non-accredited companies.

Beyond that, attempting to isolate insurance accreditation as a criteria to determine a meaningful market is inapt in yet another way. Non-central station services can and often do obtain insurance certification and, as a consequence, comparable insurance premium reductions are also available to subscribers to non-central station protection service (see, e.g., R 1012-21, 2880-1, 3207, 4618, 4733, 4766, 4771-3, 4814, 4964, 5056, 5116, 5118-19, 5156, 5480, 5561, 5542, 5660, 5689-90, 5703).

In point of fact, insurance premium reductions for all protection systems are available and the amount of the discounts are on sliding scales that overlap the reductions available for central station service. Much depends on the type or location of the protected place. Thus, the maximum insurance premium reduction granted for the highest form of central station protection service (where keys to the protected premises are in the hands of the burglar-protection company) is 70% for premises above floor grade and 60% for premises below that and the scale goes down (depending on the type of central station service rendered) to 22% (R 1021). By contrast, however—without any central station protection—a full 25% reduction can be had for doing no more than installing a metal screen around an otherwise unguarded show window; and the reduction goes up to 50% if the window is located in a hotel lobby (Manual of Burglary, Theft and Robbery Insurance, Rules and Rates, 1958 ed. [Gov't Exhibit 1 on the deposition of Donald Pillsbury, R 2984] pp. 340-1). More than that, insurance premium reductions for watchmen, local alarm and other non-central station protection services are also on a sliding scale (from 15 to 35% for local alarms; from 10% to 90% for some watchman service) which overlap and, as just seen in the case of watchmen, surpass the reductions permitted for central station protection (R 1012-

16, 1018, 1020). Accordingly, the district court's finding (No. 5, R 748) that "Discounts accorded to accredited central station service subscribers tend to be noticeably larger than for users of other systems" does not reveal the whole picture.

And the statement in Finding 33 (R 754) that "Insurance companies allow their insured a far larger reduction of premium for accredited central station service than for other types of protective service" is similarly misleading because the greatest reduction available is not from central station service.

Nor is there much persuasion in the fact (Finding 34, R 754) that there may be "trade associations uniting under one roof accredited central station protective service companies, and not including the generality of all types of automatic alarm systems." If a member of such an association quits the association, but stays in business, he is obviously still a competitor.[8] So, too, if a competitor chooses not to join the association, that in no way detracts from the commercial reality that he is a competitor—and it is commercial realities which are the stuff from which relevant markets must be drawn. Indeed, many trade associations come to mind that are composed too narrowly to be deemed a relevant market. Thus, for example, there are associations of dealers in particular makes of automobiles which exclude dealers in other makes of automobiles, yet, as has been expressly held, the relevant market is not Studebaker cars or Hudson cars, but includes all automobiles that are in real competition with each other. See *Webster Motor Car Co.* v. *Packard Motor Car Co.*, 243 F. 2d 418 (D. C. Cir. 1957), cert. den. 355 U. S. 822 (1957); *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), aff'd 239 F. 2d 176 (4th Cir. 1956), cert. den. 355 U. S. 823 (1957).

There are, to recapitulate, many central stations which have not sought insurance accreditation and which have

8. There is no evidence, for instance, that Holmes is a member of any trade association and, in point of fact, it is not. Moreover, there are trade associations that include central station and local alarm companies (R 372, 4912-13, 5020, 5707-8).

enjoyed substantial revenue in direct competition with accredited central stations. These stations have found that the expense and effort to obtain and retain accreditation is not worthwhile, that the matter of insurance discounts is not an important commercial factor in the business of furnishing protection service. The views of those businessmen, in the field, we submit, have a commercial validity that should not and cannot be overlooked.

There are great numbers also of non-central station companies furnishing service in central station areas, the government itself estimating in this case that 5,000 to 6,000 such companies are listed in telephone directories in this country (Transcript of Hearing, Jan. 10, 1963, p. 74). And many of these firms, obviously, are or could become insurance accredited if they chose to.

The vigor and extent of the competition of non-central station systems—accredited and non-accredited—are substantial. In New York City alone, for example, there are some 30,000 local alarm systems (GX 339, p. 44). Diebold, to mention but one company, a supplier of direct-connected, local and proprietary systems, testified that it competes with central station service; that it installed direct-connected burglar and holdup alarm systems in almost 1,200 banks in the years 1959-1962 and secured therefrom sales revenue exceeding $4,000,000 and service contract income of more than $200,000 (R 5234, 5236). The Edwards Company, to mention another, which sells local, direct-connected, auxiliary and proprietary systems in most metropolitan areas, had sales in the years 1957-1962 of approximately $11,000,000 (R 5264). And the government itself, in protecting public buildings with essentially similar protection needs and in the same city, uses a proprietary system for some buildings and accredited central station protection service for others (R 95-8, 108, 489-94, 3647-66; Finding 12, R 749).

More than that, the evidence is uncontradicted that businesses having identical protection problems (e.g., jewelry stores in the same neighborhood and with approximately the same inventory) will have different protection

systems—some using central station service and some using non-central station service (see, e.g., R 361-3, 370, 450-3, 467-9, 602, 3111-12, 4902, 5014, 5303, 5340, 5461-3, 5527, 5663; Finding 12, R 749). Still further, the record shows that businessmen switch from one type of protection service to another (R 367-8, 382, 388-9, 396-7, 429-31, 457-8, 467-9, 2902, 3112, 4338-9, 4353, 4354, 4361, 4368-70, 4373, 4379-81, 4402, 4403, 4467-69, 4471-2, 4530-1, 4544-4589, 4615-16, 4867, 4869, 4878, 5006-7, 5105-6, 5107, 5162, 5306-7, 5390-4, 5411, 5412, 5415-16, 5419, 5424-5, 5462, 5538-9, 5550, 5703-8, 5715; GX 320, p. 147; GX 337, p. 92; GX 339, pp. 23, 61, 66; GX 356, pp. 25-6—all of which involve switches out of central station services or loss of central station service business to non-central station protection systems).

There are thus substantial market alternatives that buyers of protective services may and, in fact, do readily use and it just cannot fairly be said, as the district court here has said, that accredited central station service is a reasonably relevant market for determining the defendants' share of the market under §2 of the Sherman Act.

The market designated by the district court is truly incomprehensible. It, on the one hand, asserts that central station and non-central station burglary protection services are not reasonably interchangeable and, on the other, that central station fire and burglary protection *are* reasonably interchangeable. It, likewise, asserts that non-accredited and accredited central station burglary protection services cannot reasonably be used in place of one another, but that central station burglary and sprinkler supervisory services are reasonably interchangeable. This produces the strange result, to be more specific, that, for example, proprietary central station burglary protection is not deemed interchangeable with non-proprietary central station burglary protection, but fire and burglary protection are held to be interchangeable; that, for another example, watchmen are not deemed a reasonable substitute for central station burglary protection, but sprinkler supervisory, burglary protection and industrial process services (like boiler pressure monitoring) are acceptable substitutes for one another.

When product function is considered, the result produced by the district court's market designation is thus nothing short of pure nonsense. It is, in other words, as obvious as anything can be that a prospective subscriber to burglary protection will not take fire protection as a substitute,[9] but he can and does take *non-accredited burglary protection* as a substitute for *accredited burglary protection;* he can and does take watchmen, or local alarm systems, or proprietary central station systems, or direct-connected systems, or telephone answering systems instead of non-proprietary central station systems. It follows, just as obviously, that the market designated by the district court is patently unreal.

Actually, on analysis, the district court itself confirms that the market designated ignores the actual market. Thus, after determining (Finding 44, R 756) that the defendants had from 87% to 91% of the designated market during the period 1957-1961, it went on (Finding 45):

> "However, it is only fair to add that from 1957 to 1961 defendant alarm companies' shares of central station subscribers and of revenue therefrom showed a slightly declining trend. Moreover, there is no persuasive evidence that any particular prospective entrant has been unable to begin operations, or that any specific CSPS firm has failed or been driven out of business. The most that can be said is that some competitors complain of what they regard as unsatisfactory profits."

And, continuing along the same lines (Finding 46):

> "Defendant alarm companies do not have unfettered power to control the price of their services. Even where they have no competition from other CSPS com-

9. He might take fire protection in addition to burglary protection (and that explains why companies such as ADT frequently sell both), but he need not take both (and that and other differences in the systems explains why companies such as AFA, Holmes and a number of non-defendants (see, e.g., R 359, 2649, 4768, 4790, 4957, 5044, 5076, 5116, 5153, 5199, 5216, 5396, 5495, 5709), may only sell one service).

panies, they have not always been able to receive the standard they have set for themselves, the so-called 'Minimum Basic Rates' (hereafter called 'MBR') or annual service charges. This is due to the fringe competition of other alarm or watchmen services."

The fact that companies who have 87% to 91% of an asserted market do not have power either to exclude competitors or fix prices in that market belies the district court's *ipse dixit* that this is due to "fringe" competition. It confirms that the competition not included in the designated market must be substantial and that the market designated is totally unreal.

This Court has held that "where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others," and that "it is the use or uses to which the commodity is put that controls." *U. S.* v. *du Pont & Co.*, 351 U. S. 377, 394, 396 (1956).

Here, the "product" is either burglary or holdup protection services or fire alarm and related services or industrial process services, but not all four of these functionally different services. And the market alternatives are not only "accredited central station protection services," but all protective services that compete in that market, including non-accredited central station systems, proprietary central station systems, direct-connected systems, auxiliary systems, local alarm systems, telephone answering systems and watchman service. When that market is considered, when, in other words, the real cross-elasticity of demand for each different protective service is considered, it is indisputable and apparently undisputed that no monopolization or attempt to monopolize charge could be leveled in this case.

The indication by the district court that the *du Pont* decision is no longer the law, apparently because of the market definitions in Clayton Act §7 cases, overlooks the fact that there are different issues under §7 of the Clayton Act and §2 of the Sherman Act. See *Crown Zellerbach*

Corp. v. *FTC*, 296 F. 2d 800, 814-815 (9th Cir. 1961), cert. den. 370 U. S. 937 (1962) and *U. S.* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y. 1958), where Judge Weinfeld wrote (pp. 593-4):

> "* * * monopoly power was defined by the Supreme Court in the Cellophane case as 'the power to control prices or exclude competition.' Obviously, when the question is power over price, substitute products may be relevant because they can limit that power. The issue under §7 of the Clayton Act is not whether a merger may result in a company having power over price or the power to exclude competition. The issue under §7 is whether there is a reasonable probability of substantial lessening of competition. There can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes."

In sum, the relevant market has been wrongly designated and when properly designated to include all of the various protective services in real competition with one another, the Sherman Act §2 case indisputably fails.

POINT III

The decree is unjust and the new rules of law necessary to reach that end are equally unwise and unwarranted.

The decree is both punitive and unprecedented. It bans a witness, Mr. Fleming, from the employment he has followed all of his life with Grinnell, and from acting as a director of Holmes; it, in the vague language of the Sherman Act, broadly enjoins each of the defendants and all persons acting on behalf of any of them from "restraining trade" or "attempting to monopolize"; it divests Grinnell of its investments in each of the alarm companies (notwithstanding that the complaint had requested divestiture only of ADT and notwithstanding that Holmes and AFA to-

gether have but some 14% of the designated market and are in separate activities—Holmes engaging in burglary and holdup protection and AFA in furnishing fire alarm, sprinkler supervisory and valve alarm protection); it prohibits Grinnell from making further acquisitions in the central station business, so that Grinnell is completely and forever excluded from that business; it similarly prohibits the other defendants, including Holmes, from any future acquisitions in the central station business notwithstanding the absence of any significant history of acquisitions or market power on the part of Holmes; and it requires the alarm company defendants, again including Holmes, to file with the Department of Justice its lists of prices and terms of sale and servicing and of every quotation, written or oral, departing from those lists or terms, within two weeks of the quotation so that, in the words of the district court, "it must report the departure and run the risk of being charged with invidious, illegal discrimination" (Opinion on Remedy, para. 4, R 765-6). This latter requirement was included notwithstanding that Holmes sells a service, not a commodity (so that the Robinson-Patman Act is inapplicable), that the plaintiff did not ask for such relief and does not know what to do with the reports when filed, that Holmes' competitors are not so burdened (and Holmes has competitors everywhere it does business) and it has been expressly found that the defendants' share of the designated market and of the revenues therefrom have declined since 1957.

The impropriety of these provisions—apart from their lack of factual basis—is apparent. The purpose of a decree in an antitrust case "is not punishment of past transgressions" (*International Salt Co.* v. *U. S.*, 332 U. S. 392, 401 (1947). "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." (*U. S.* v. *du Pont & Co.*, 366 U. S. 316, 376 [1961].)

Yet, it is nothing short of punishment—and an unprecedented punishment—to deprive Mr. Fleming of all employ-

ment in the business to which he has devoted his life. Especially is this so when, as here, his good character was specially mentioned by the district court at the trial and there is no basis to believe he would not, with the advice of counsel, in good faith, carry out the terms of any decree.

And, it is nothing short of punishment to require the alarm companies to engage in the reporting required by the decree in the circumstances of their selling a service, not a commodity, and their being in competition with others who are not so burdened.

And, it is nothing short of punishment to ban Holmes from making any acquisitions in the absence of any substantial or recent history of acquisitions by Holmes, who, even in the market designated by the district court, had only some 12%.

And, it is nothing less than punishment to require Grinnell to divest itself of all of its investments in the protection service field and never to make any acquisition in that field. The punitive nature of this is particularly glaring when it is seen that AFA has only 2% of the designated market and Holmes but 12% and both of these companies have been ordered divested. As this Court has said: "divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective measures less harsh, are available." (*Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 603 [1951].) And, as the Attorney General's National Committee to Study the Antitrust Law (1955) reported (p. 354): "courts as a rule have refused divestiture in the absence of some clear showing of its necessity to insure effective competition, its practicality and, in light of surrounding circumstances, its basic fairness."

No such "clear showing of necessity to insure effective competition," we submit, has been made to call for divestiture here. In *U. S.* v. *General Electric*, 115 F. Supp. 835 (D. N. J. 1953)—where there was much more at stake than, as the district court put it in this case, "the rooting out of a plant of minor importance in the rich forest of the American

economy" — the court, in denying divestiture, reasoned that, since the "violations . . . can be eliminated by means of the other provisions of the judgment, . . . divestiture . . . is not necessary to foster competition" (p. 871).

Nothing more is called for in this case. Surely, here, the extreme remedy of divestiture is not necessary. Since the acquisition by Grinnell of its co-defendants is not what is challenged (the Department of Justice having concurred at the time that the last acquisition, that of ADT, was not out of order), it must be that the government's complaint is based on occurrences since the acquisition. Surely, the basis for any such complaint—assuming it was established —could be eliminated by a proper injunction.

Surely, too, the sweeping injunction issued by the district court, repeating the broad language of the Sherman Act, is objectionable and invalid under Rule 65(d) of the Federal Rules of Civil Procedure and under an unbroken line of precedents from *Swift & Co.* v. *U. S.*, 196 U. S. 375 (1905) through *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386 (1945) to *FTC* v. *Henry Broch & Co.*, 368 U. S. 360 (1962). As was succinctly said in *Hartford-Empire* (p. 410): "The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; [or] enjoin 'all possible breaches of the law.' "

Twelve years ago the same district judge who decided this case, in refusing divestiture, wrote (*U. S.* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 348 [D. Mass. 1953], aff'd per curiam 347 U. S. 521 [1954]):

> "In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law. * * * They would not have been given, or allowed to keep, such authority in the anti-trust field, and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power."

While "surgical ruthlessness" was not recommended in that case for that purpose, we wonder why that same judge, in this case, felt it necessary "to apply surgical measures to cut deep into already established industrial patterns" (Opinion on Remedy, para. 2, R 765). And, especially is this so when the record is explicit that before this suit was brought Holmes did not consider itself to be under any restrictions as to either service or service areas as is evidenced by its negotiation in 1960 to purchase Newark District Telegraph Company, which offers all types of electric protective service (including fire alarm) and operates in New Jersey (R 353, 380, 1290-4), its study of an expansion into Westchester in 1957, an area, like Newark, already served by ADT (Exh. H-10), and its otherwise going into suburban areas (R 1313-14).

In truth, the decree carries out the district court's *PRE-TRIAL* threats that "You would do better to get together with the government rather than run the risk of what I would say from what I have seen. Let me just assure you of that. And I mean every word, and you can underline that four times" (R 256); "I have read enough to know that if I have to decide this case on what I have seen from the government you will not be in a position at this stage to agree to it"; "my views are more extreme than those of the government; and * * * if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases" (R 281-2).

So, too, the decree carries out the district court's statement that it was capable of "Draconian measures of great severity" (R 129).

It remains now to be seen whether some of the district court's other comments on the record in this case—such as "I just assure you it [questions and answers showing the reasonableness of activities alleged to be in restraint of trade] is a great ceremonial act, as far as I am concerned" (R 377); "This is an exercise in trying to persuade Congress or five Justices of the Supreme Court but it won't

have the slightest effect on me" (R 530); "I do not believe it makes the slightest bit of difference what is being shown in this case by both sets of counsel * * * I am quite sure that in the long run the Supreme Court of the United States is going to take about as narrow a view of the market as the circumstances here permit" (R 544)—are also to be allowed to come to pass.

The draconian measures in the decree are all the more surprising in view of the district court's acknowledging that these companies were small companies and their conduct not "corrupt" or "imperial"; that "this is not a 'big case' in any sense"; and that "all that is at stake here is the rooting out of a plant of minor importance in the rich forest of the American economy" (Opinion on Liability, paras. 8-10; Opinion on Remedy, para. 1; R 763-4).

The basis for the extraordinary banishment of Mr. Fleming from the field in which he had been employed all of his life is equally confusing. At the trial, Mr. Fleming was showered with praise (R 691-3). In the Opinion on Remedy he, however, has acquired a "possibly, risk-taking temperament" and, after it is surmised (para. 2, R 765):

> "Maybe he shrewdly weighed business advantage against business disadvantage, and with keen appraising eye estimated the law's delays, the fluctuating policies of the Department of Justice, the improbability of private suitors with adequate funds and resolution, the reluctance of courts to apply surgical measures to cut deep into already established industrial patterns, and, in any event, the plausibility of the oft-cited, if strangely inapt, metaphor that one cannot unscramble eggs."

Mr. Fleming emerges as "the vigorous captain of the defendants conspiracy to monopolize" (para. 6, R 767).

But, the sole prop for the district court's determination of monopoly is its novel theory that monopoly power is presumed from a predominant position in a designated market and its determination that the defendants had not carried the burden of overcoming that presumption.

As seen, however, the market in which the defendants allegedly have a predominant (87% to 91%) position, is not a commercially meaningful market. And, as also seen, proof of this is ample and is confirmed beyond doubt when it is realized, as is conceded, that the defendants have neither the power to exclude competition or to fix prices—always necessary hallmarks of monopoly. See *U. S.* v. *du Pont & Co., supra,* 351 U. S. 377 (1956), where this Court, through Mr. Justice Reed, said (p. 380):

> "to determine whether an alleged monopolist violates §2 * * * [t]he ultimate consideration * * * is whether the defendants control the price and competition in the market"

and (p. 389):

> "Our cases determine that a party has monopoly power if it has, over 'any part of the trade or commerce among the several States,' a power of controlling prices or unreasonably restricting competition."

and (p. 391):

> "Monopoly power is the power to control prices or exclude competition."

See also, *U. S.* v. *Griffith,* 334 U. S. 100, 107 (1948, per Douglas, J.).

That the defendants here, who have some 87% or more of the assertedly relevant market, unquestionably do not have power either to exclude competitors from that market or to control prices in that market is demonstrative that such market is not a commercially apt or relevant market.

It is demonstrative also that the defendants here have not monopolized, notwithstanding the district court's announcing for the first time, after the trial, that it was taking a new approach to §2 Sherman Act charges and placing a new and theretofore unstated burden on these defendants. In the district court's words:

"most of the cognoscenti have expected that a day would come when the Supreme Court would announce that where one or more persons acting jointly had acquired so clear a dominance in a market as to have the power to exclude competition therefrom there was a rebuttable presumption that such power had been criminally acquired and was a monopolizing punishable under §2.

"To this Court it appears that the day has come for it, and more important for counsel to proceed on the knowledged principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of §2."

From the unreal market which it designated—of which Holmes had but 12.55% of the annual revenue—the district court assumed monopoly power (notwithstanding that it specifically found no power to exclude competitors or control prices and that competition was increasing and defendants' market share diminishing) solely because the defendants did not meet the burden, newly declared to be theirs after the trial, of proving that they did not have monopoly power and had not violated the antitrust laws.

There is, of course, a basic contradiction in the district court's decision. On the one hand, it declares (Opinion, R 745): "where one or more persons . . . acquired so clear a dominance in a market *as to have the power to exclude competition therefrom*" (italics added) criminal monopolizing is presumed. That, of course, is explicit recognition that "the power to exclude competition" is a necessary part of the test of "criminally monopolizing". But, at the same time the district court has expressly found (Findings 45 and 46, R 756) that these defendants did not have the power to exclude competition. The district court is thus correctly saying that the power to exclude competition is es-

sential to a §2 violation and, it is also saying, that the defendants have not that power. It follows that the defendants have not violated §2. But the district court concludes otherwise and it seeks to bridge the gap in its logic by the creation of a "presumption" of monopoly power, which presumption the defendants were told (after the trial) they must overcome and, not having done so, they were deemed to have monopolized. The presumption device is sheer nonsense. It results, as this very case demonstrates, in defendants who could not be monopolizers under the district court's own definition (because they did not have monopoly power) being presumed and then held to be monopolizers (because they did not overcome the presumption). Indeed, in this case the result is even more absurd because the presumption was not overcome only because the defendants, not being "cognoscenti," were not apprised of the fact that "the day [had] come" for such a presumption (Opinion, R 745).

The truth of it, of course, is that the presumption is as artificial as the designated market in this case. And, like the artificial market, the artificial presumption serves no useful purpose since, in the next case, it will not only not save the trial court's time, but it will take more of it.

The district court's justification for this presumption, for so altering and violating basic concepts of procedure and fairness and for such unwarranted and unwise restructuring of §2 of the Sherman Act, appears in these paragraphs of its opinion (R 745-6):

> "Such a shifting of the burden not merely of going forward, but of proof, such a rebuttable presumption rests on the by-now dozens of court records which make it quite clear that it is the highly exceptional case, a *rara avis* more often found in academic groves than in the thickets of business, where monopoly power was thrust upon an enterprise by the economic character of the industry and by what Judge L. Hand in *Aluminum* called 'superior skill, foresight and industry.' More than 7 decades of Sherman Act enforcement leave

the informed observer with the abiding conviction that durable non-statutory monopolies (ones created without patents or licenses or lasting beyond their term) are, to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by §1. They are the achievement of the quiet life after the enemy's capitulation or his defeat in inglorious battle,"

* * *

"The Government need not prove, and in a well-conducted trial ought not to be allowed to consume time in needlessly proving, defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role. If defendant does wish to go forward, it is free to do so and to maintain the burden of showing that its eminence is traceable to such highly respected causes as superiority in means and methods which are 'honestly industrial', as Judge Hand characterized the suppositious socially desirable monopolizer."

The district court's opinion, like much of its findings, is perhaps bright in imagery and rich in rhetoric, but imagery and rhetoric are—or should be, if the judicial process is to continue to have respect and meaning—not substitutes for fact and fairness.

Since nothing in this record shows "the achievement of the quiet life after the enemy's capitulation or his defeat in inglorious battle," but, on the contrary, shows—as the district court's unquestioned findings confirm—that competition is increasing for the defendants, it is plain that the district court has ignored the facts of the particular case before it in its haste to present its novel theory. And, the time saved by relieving the government of the burden of proving "defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies" will, if the district court's theory is adopted in future cases, where defendants are ap-

prised that such theory is in operation, be more than offset by the time consumed in defendant's effort to prove a negative, that is, that its practices and policies were proper and that it did not violate the antitrust laws.

The end result ostensibly sought by this extreme departure from precedent and fairness by the district court would thus, quite obviously, not be achieved. More than that, the opposite result would occur: the presentation and record in monopolization cases would be extended far beyond anything needed or known to date.

That there is involved a wide, unwarranted and extremely unwise departure from normal and well-considered antitrust jurisprudence is without question. Contrary to what the district court has held in this case, this Court has laid down the rule that plaintiff has the burden of establishing that defendants possess monopoly power. *U. S.* v. *du Pont & Co., supra,* 351 U. S. 377 (1956); *American Tobacco Co.* v. *U. S.,* 328 U. S. 781 (1946). And, contrary to what the district court has held in this case, this Court has declared that monopoly power is the power to control prices or exclude competition. *U. S.* v. *du Pont, supra*; *U. S.* v. *Griffith, supra,* 334 U. S. 100 (1948).

Further, contrary to what the district court has held in this case, it has long been the settled law—down to this very term of court—that market dominance (which, as already seen, in any event, neither Holmes nor the defendants together enjoy) is not *per se* illegal. *Clark Marine Corp.* v. *Cargill, Inc.,* 226 F. Supp. 103 (E. D. La. 1964), aff'd 345 F. 2d 79 (5th Cir. 1965), cert. den. —— U. S. —— (Jan. 24, 1966); *U. S.* v. *Aluminum Co. of America,* 148 F. 2d 416, 425, 429-30, 434 (2d Cir. 1945); *United Banana Co.* v. *United Fruit Co.,* 245 F. Supp. 161, 169, 175-7 (D. Conn. 1965); *U. S.* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 344-5 (D. Mass. 1953), aff'd per curiam 347 U. S. 521 (1954).

These precedents should be retained and the determination below, that there has been monopolization in the absence of power to exclude competition or control prices and in the presence of a declining trend in defendants' share of subscribers and revenue, reversed.

And the determination that defendants have attempted to monopolize must also be reversed, for there is no finding or proof that the defendants had a specific intent to destroy competition and build a monopoly and absent such proof there can be no guilt of *an attempt* to monopolize. *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594 (1953).[10]

And, that dismissal must accompany reversal here is likewise plain, because, as it has just recently been explicitly held, "proof of the relevant market . . . was necessary to the Government's claim of attempted monopolization" just as it is an essential to proof of a charge of monopolization. *U. S.* v. *Chas. Pfizer & Co.*, 245 F. Supp. 737, 739 (E. D. N. Y. 1965); see also, *Walker Process Equip.* v. *Food Mach. Chem. Corp.*, —— U. S. ——, 15 L. Ed. 2d 247, 251 (Dec. 6, 1965); *U. S.* v. *Johns-Manville Corp.*, 231 F. Supp. 690 (E. D. Pa. 1964); *American Football League* v. *National Football League*, 205 F. Supp. 60, 65 (D. Md. 1962), aff'd 323 F. 2d 124 (4th Cir. 1963).

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10. The district court's findings in this connection are only to the effect that motivation is not important. Thus, Finding 19 (R 750-1) tells us "However, in courts, unlike on the stage, the drama need not concentrate upon the parties' motives." And Finding 20, to like effect, confirms that there has been neither proof nor findings with respect to intent:

> "Yet, just as the Government has no obligation to prove defendants' motives, so the Court is under no duty to make findings with respect to those springs of action."

This may be true for monopolization (see *U. S.* v. *Griffith*, supra), but it is not true for an attempt to monopolize (see *Times-Picayune Pub. Co.* v. *U.S.*, supra). And the district court here, in its opinion, itself acknowledged that difference when it wrote (R 746): "So far as concerns a charge of 'monopolizing', *unlike the lesser offense of 'attempting to monopolize'*, it is not necessary * * * for the complainant to prove more than that defendant intended to engage in the practices which maintained its market power." (Emphasis added.)

POINT IV

There is no evidence that Holmes' business is in interstate commerce or that it substantially affects interstate commerce.

There is no evidence that Holmes' business—providing burglary and holdup protection on a local basis to subscribers within 25 miles—is in interstate commerce or that it substantially affects such commerce. None of Holmes' stations serve a subscriber more than 25 miles away (Finding 3, R 747) and, in fact, no station serves a subscriber in another state. Operations in each of the three cities in which Holmes or its subsidiaries do business are run by a separate corporation (R 2301-11). The only way the district court found Holmes in interstate commerce was by pretending its operations were national or by treating it as part of a supposed Grinnell-controlled national conspiracy.

Thus, Finding 4 recites (R 747-8):

> "A central service station, in its normal daily service operations, is physically independent of any other central service station. As already noted, its service is summoned, responds, and is consummated usually within a twenty-five mile radius. This is *not* to imply that the ultimate supervision is not nationally directed; nor that the system of operations, nor that the equipment used; nor the checking of equipment, nor the reports about the system have a purely local, individualized character, origin, or destination. On the contrary, the enterprise in appearance and reality, in financing, selling, advertising, purchasing of equipment, processes of management, and over-all planning is national; though, of course, the impact, as is true of every enterprise, is upon local specific points."

This finding obviously has nothing to do with Holmes. Holmes is not "national" in "appearance and reality" nor

"in financing, selling, advertising, purchasing of equipment, processes of management and over-all planning." Anyone who knows Holmes knows that, and this record could not demonstrate otherwise. And, Finding 40 tells us (R 755):

> "A fire or burglary may be local. Alarms may be sent to a point only a few blocks away. Relief may be dispatched from a local fire or police station. But the system of accredited CSPS rests upon the far-flung structure (a) of national planning, (b) of lapsed agreements covering activities in many states, (c) of inspection, certification, and reduction of rates by national insurers, (d) of defendants' national schedules of prices, rates, and terms, and (e) even, on occasion, of national special discount prices to a particular customer who operates multi-state enterprises."

Here, the district court is apparently not only referring to defendants as a whole, but to a number of the competitors of each of them as well, in order to reach interstate commerce. Who else is included in "the system of accredited CSPS"? And who engages in "national planning" or "lapsed agreements covering activities in many states" or "national special discount prices"?—not Holmes, which does not operate nationally. If the reference to "defendants' national schedules of prices, rates and terms" means that the district court understood that the alarm company defendants had the same national schedule of prices, rates and terms, then the district court is doubly wrong. Holmes is neither national, nor are its prices the same as that of the other defendants.

Again, in Finding 39 (R 755), the district court asserts the bald conclusion: "The existence of a national market is underlined by defendants' own national pattern of business * * *."

But there are no findings as to Holmes and there is no evidence that Holmes engaged in any national operations. Its business, in all respects, soliciting, advertising, selling,

installing, servicing, billing, were necessarily local. That others in the business may be in interstate commerce is no valid basis for making Holmes' business part of "commerce among the several states," to which the Sherman Act is applicable.

It is unquestioned that "a restraint on or a monoply of * * * general local service, without more, is not proscribed by the Sherman Act" and that a "complaint, insofar as it is based on such local * * * service, fails to state a cause of action under the Sherman Act." (*U. S.* v. *Yellow Cab Co.*, 332 U. S. 218, 233 [1947].) Thus, it has been held, the business of taxicab companies in conveying interstate train passengers between their homes and the railroad station in the normal course of their independent local service is not "in interstate commerce" and is without the purview of the Sherman Act. (*U. S.* v. *Yellow Cab Co., supra.*)

Likewise, local operations of taxicabs in furnishing passenger service to and from an airport handling interstate flights did not constitute a part of "interstate commerce" within the Sherman Act. (*Evanston Cab Co.* v. *City of Chicago,* 325 F. 2d 907 [7th Cir. 1963], cert. den. 377 U. S. 943 [1964].)

So, too, alleged violations of §§1 and 2 of the Sherman Act on the part of a number of medical societies, a corporation selling prepaid medical care and certain doctors was held not to be in interstate commerce notwithstanding a number of "sporadic and incidental" payments to out-of-state doctors and hospitals for treatment of policyholders who were out of the state when the need for service arose. (*U.S.* v. *Oregon State Medical Society,* 343 U. S. 326 [1952].)

Similarly, in *Page* v. *Work,* 290 F. 2d 323 (9th Cir. 1961), cert. den. 368 U. S. 875 (1961), Sherman Act §§1 and 2 charges were ousted because the business of publishing legal notices in a newspaper was determined to be sustantially intrastate business. As the court noted (pp. 331, 332):

> "The claimed restraints applied by appellee newspapers and their activities to monopolize or attempt

to monopolize * * * were on a purely local level * * * the court properly concluded that the product involved is not in the flow of interstate commerce.

* * *

"* * * the courts have consistently required that in order for federal antitrust to be sustained the effect on interstate commerce of an alleged act must be direct and substantial, and not merely inconsequential, remote or fortuitous."

Again, in *Bailey's Bakery, Ltd.* v. *Continental Baking Co.*, 235 F. Supp. 705, 715 (D. Hawaii, 1964) it was said that the fact that tourists were served baked goods, or that bread sold to the military forces was taken out of the state or that the materials going into the bread were shipped from out of the state would not render a baked goods manufacturer liable under the Sherman Act.

Once more, in *Lieberthal* v. *North Country Lanes*, 332 F. 2d 269 (2d Cir. 1964) respected authority held that there was no jurisdiction in a district court over an alleged Sherman Act violation (restraining the flow of bowling alley equipment needed to complete a competing bowling alley), notwithstanding that the defendant operated an interstate chain of bowling alleys, because there was no "showing that the conspiracy had an impact on *interstate* commerce either because the acts complained of occurred in interstate commerce or because those acts, though occurring wholly on the local level, substantially affected interstate commerce."

These cases are but a sampling . There are others. See, *e.g.*, *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F. 2d 167, 170 (8th Cir. 1959), cert. den. 361 U. S. 884 (1959); *H. E. Fletcher Co.* v. *Rock of Ages Corp.*, 326 F. 2d 13 (2d Cir. 1963); *Hotel Phillips* v. *Journeymen Barbers*, 195 F. Supp. 664, 666 (W. D. Mo. 1961), aff'd per curiam 301 F. 2d 443 (8th Cir. 1962); *Lawson* v. *Woodmere, Inc.*, 217 F. 2d 148, 149 (4th Cir. 1954); *Martin* v. *National League*, 174 F. 2d 917 (2d Cir. 1949); *Marks Food Corp.* v. *Barbara Ann Baking Co.*, 162 F. Supp. 300 (S. D. Calif. 1958).

All of which points our conclusion here—that there is yet another reason why this complaint must be dismissed as to Holmes, for there is no showing that Holmes' business is in interstate commerce or that it or the activities complained of as to it substantially affects such commerce. The protection service that Holmes provides on a local intrastate basis is certainly no more in interstate commerce than the taxi business at airports or railroads or the bowling alley business of an interstate chain of bowling alleys or the publishing of legal notices in a newspaper or the selling of prepaid medical care or the baking or selling of bread from ingredients brought from without the state. And the charges of monopolizing and restraint of trade in those cases were no more than the charges made against Holmes here.

The point is that neither the allegations of a "national conspiracy" or anything shown in this case alters the entirely local character of Holmes' business. "If the converse were true, every country store that obtains its goods from and serves customers residing outside the state would be selling in interstate commerce. Uniformly, the courts have held to the contrary." *Elizabeth Hospital, Inc.* v. *Richardson,* supra, 269 F. 2d 167, 170 (8th Cir. 1959), cert. den. 361 U.S. 884 (1961).

It follows that the Sherman Act is inapplicable to the business of Holmes.

POINT V

The government's appeal to enlarge the relief is totally unsupportable.

From what has already been said with respect to the excessive relief granted by the district court and the lack of any basis for it, or any relief, in the record or in the precedents, it is plain that the government's appeal to enlarge the relief is utterly without merit.

The government, among other things more fully answered in the other briefs herein, seeks now also to require the defendants, including Holmes, to transfer title to that

part of the defendants' protection equipment that is on subscribers' premises to the subscribers. If adopted, that proposal, apart from taking from Holmes an important asset for which it has not been paid (Holmes' installation charge covers only certain of the costs of installation—and *not* the cost of the re-usable equipment installed [R 646-8]), would seriously jeopardize the integrity of the protection. It is, in other words, very much essential for the maintenance of dependable quality protection against burglary or holdup that the protection company have control over all of the protection equipment so that the system can be properly repaired and maintained, can be better prevented from becoming available for analysis by burglars or holdup-men, can be changed and improved as technology advances, can be kept compatible and uniform over the years with other equipment that the protection company owns and uses in conjunction with it, and can be re-used to the ultimate advantage of all subscribers, who benefit from the consequent reductions in cost. That this is so, that it is good and important for the protection company to retain title to the protection equipment used in conjunction with a central station, is confirmed by the fact that, over the years, subscribers have not sought to purchase such equipment, insurance underwriter's regulations call for ownership of those protection devices by the protection company and, apparently, all companies operating central station protection systems have retained title not only to that part of the system on their own premises, but also to that part of the system on the subscriber's premises.

Conclusion

The district court's assertion of monopoly stands only on its novel theory that monopoly power is presumed where a predominant position in a designated market appears.

The complete answer to that assertion is that the new theory does violence to sensible and established concepts of monopoly (that monopoly power is the power to exclude competition or to fix prices) and achieves no legitimate purpose (since the saving in time in proving plaintiff's case,

which is the only justification for the proposed presumption, will be more than offset by the additional time expended while defendant seeks to overcome the presumption by showing that he did not monopolize). Beyond that, however, in this case, the designated market is entirely artificial and this is confirmed by the fact that the defendants, with some 87 to 91% of that so-called market, concededly have not the power to exclude competitors or fix prices.

An additional answer to the district court's assertion that monopoly has been attempted is that no specific intent to destroy competition or to build monopoly has been found or shown and such a showing and finding is essential to guilt of an attempt to monopolize.

Similarly, the district court's determination that interstate trade has been restrained rests entirely on its attributing the acts of any one defendant to all of the defendants and there is no finding or evidence to support any such conspiracy or combination.

Moreover, it has not been shown that the business in which Holmes is engaged is in interstate commerce or that it substantially affects interstate commerce.

The judgment of the district court, accordingly, should be reversed and the complaint dismissed.

Respectfully submitted,

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Appendix A

Sherman Act, §§1, 2 and 4, as amended (15 U. S. C. §§1, 2, 4) in pertinent part provides:

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§4. Jurisidiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent

and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

United States Constitution, Fifth Amendment provides:

Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.